No. 83-990

In The
Supreme Court of the United States
October Term, 1983

THE SCHOOL DISTRICT OF THE CITY OF GRAND RAPIDS; PHILLIP RUNKEL, Superintendent of Public Instruction of the State of Michigan; STATE BOARD OF EDUCATION OF THE STATE OF MICHIGAN; LOREN E. MONROE, State Treasurer of the State of Michigan; IRMA GARCIA-AGUILAR and SIMON AGUILAR, BRUCE and LINDA BYLSMA, ROBERT and PENELOPE COMER, CLARENCE and ROSALEE COVERT, SCIPUO and JANICE FLOWERS, JOHN and SHIRLEY LEETSMA,

Petitioners,

v.

PHYLLIS BALL; KATHERINE PIEPER; GILBERT DAVIS; PATRICIA DAVIS; FREDERICK L. SCHWASS and WALTER BERGMAN,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS

Albert R. Dilley
Attorney for Respondents
600 Grand Rapids Mutual Bldg.
201 Monroe Avenue, N.W.
Grand Rapids, Michigan 49503

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STATEMENT OF THE CASE

The filing of this case August 7, 1980 in the Western District of Michigan followed a decision January 23, 1980 in that same District Court in *Americans United for Separation of Church and State v. Porter*, 485 F. Supp. 432. The issues of fact and law in that case, which involved a lease program in the Traverse City School District, were nearly identical to the instant case.

About 1975 Grand Rapids School District (hereinafter GRSD) initiated a program of providing various educational services to K-12 schools operated by various sectarian organizations and association. By 1978 these educational services had been extended to 40 sectarian schools. The number of nonpublic students had increased to 9,494, and the state school aid funds totalled $1,397,577 (4a, J.A. 382). Courses offered by GRSD on the site of these various nonpublic schools included Reading, Math, Science, Art, Home Economics, Music, Physical Education, Humanities, and Foreign Language. These were offered in 28 different Roman Catholic school buildings, 7 Christian school buildings, 3 Lutheran school buildings, 1 Seventh-Day Adventist, and 1 Grand Rapids Baptist Academy school. 10a.

This program was further increased in 1979-80 to include 10,677 nonpublic students. Some of these sectarian schools receiving educational services from the Public School District are situated in close proximity to public schools offering the same classes, some even directly across the street. By 1981-82, the program had been extended outside the boundaries of GRSD, even into a neighboring county; (J.A. 456, parag 181) the number of participating nonpublic students was above 11,000; and state school aid approached $6,000,000. 4a. The program operated on a budget of approximately $3,000,000

leaving the remaining $3,000,000 as "profit" for the school district. 74a.

The procedural device which provided the GRSD access to the sectarian school buildings was a formal lease. (J.A. 202). The unique functional concept of this lease is that it does not expressly pertain to any described wing, floor, or room in the parochial school but, rather, its impact accompanies the public school teacher into and about the building so that certain rooms are transformed into "public school" classrooms as and when the teacher convenes class there. As each room in this manner becomes a "public school", the students occupying the room become "public school students". (J.A. 381, 426, paragraphs 90, 91, 92). The School District requires its teachers to carry and to post signs which identify each such area as a public school classroom. (J.A. 427). Also, each such classroom is "desanctified" by removing crucifixes, religious symbols, and artifacts, although such objects are permitted to remain in adjoining corridors, surrounding rooms, or other facilities used in connection with the leasehold. (J.A. 428, 5a).

During the 1981-82 school year, rental payments in excess of $200,000 were made by GRSD to the participating nonpublic schools, based on $10 per class per week in high schools and $6 per class per week in elementary schools. (116a, J.A. 426). Petitioners have incorrectly stated at Page 10 of their Brief that there were no payments of public funds to nonpublic schools.

These classes conducted by GRSD in leased classrooms in buildings owned and operated by sectarian school organizations are known as "Shared Time" and "Community Education" programs. The "Shared Time" classes are during regular school hours in courses such as

Reading, Math, Art, Music, and Physical Education, while "Community Education" classes in issue in the trial court were both before-school and after-school classes in a great variety of courses including Business, Typing, Astronomy, Industrial Arts, Photography, Psychology, Music, Sports, and Hobby & Crafts. 7a.

The Notice of Appeal from the District Court filed by Defendants August 18, 1982 states "no appeal is taken from such judgment on the merits to the extent it prohibits physical education and industrial arts shared time classes at the secondary level and community education classes at the secondary level". Thus, the case in the Court of Appeals and this Court involves only the following parts of the program at issue in the trial court:

1. Shared Time classes at the elementary level.
2. Community Education classes at the elementary level. These are "after-school" classes.
3. One Remedial Math Shared Time class at the secondary level.

Students attending Shared Time and Community Education courses in the leased facilities within nonpublic school buildings are enrolled for all other classes in that nonpublic school program. (J.A. 457, 431, 432). Thus, there is complete identity between students receiving Shared Time and Community Education instruction at any given nonpublic school and the students regularly attending that nonpublic school. 22a.

The total Shared Time and Community Education program in issue in the trial court involved 470 full and part-time teachers employed by GRSD. (J.A. 440). A significant portion of the Shared Time instructors previously taught in nonpublic schools, and most of those, upon becoming employed by GRSD, were assigned to the same nonpublic school building where they were pre-

viously employed. The Community Education offerings on facilities leased from a nonpublic school are taught by instructors employed full time by the very same nonpublic school. (J.A. 433-440).

The Michigan Legislature, under MSA 15.41282; MCLA 380.1282, has authorized local school districts to provide the programs here involved. (J.A. 152). That section provides:

> "The board of a school district shall establish and carry on the grades, schools, and departments it deems necessary or desirable for the maintenance and improvement of the schools, determine the courses of study to be pursued, and cause the pupils attending school in the district to be taught in the schools or departments the board deems expedient."

Also, in the exercise of its general power to appropriate public funds, the Michigan legislature has authorized the payment of state school aid funds to local boards of education for part-time public school pupils receiving Shared Time instruction on leased premises. MSA 15.1919 (901) *et seq;* MCLA 388.1601 *et seq.* Also, MSA 15.4331; MCLA 380.331. (J.A. 153, 154).

SUMMARY OF ARGUMENT

This case involves the question of whether delivery of teacher services by a public school district to day schools owned and operated by churches and religious organizations, furnished pursuant to a lease of space in those school buildings and under circumstances of close cooperation between the parties to such lease, violates the Establishment Clause of Article I of the Bill of Rights of the United States Constitution.

Respondents proved by many exhibits and witnesses that the religious schools are closely affiliated with religious organizations, that their student bodies contain a high percentage of children professing those religions, that their avowed purpose and function is to integrate religious doctrine into all academic material presented in the schools, and that they succeed in this objective to the extent that a substantial portion of their functions are subsumed in the religious mission of the church institutions.

Having established the sectarian character of the schools involved, Respondents argue that the teacher services are delivered by Petitioner School District to these *schools,* not to the individual *students,* who could independently obtain the same services at the nearest public school building. The thrust of the program was to subsidize religious schools by augmenting their teaching staffs through the Shared Time Program, and to supplement the salaries of their teachers and administrative personnel through the companion Community Education Program; also, it served to broaden the curriculum of the religious schools. This constitutes significant, direct financial aid to the sectarian institutions in violation of the Establishment Clause.

Respondents argue that the programs resulted in extraordinary entanglement between government and religion in the process of actual delivery of these services to the religious organizations, in violation of the Establishment Clause. The entanglement showed up in duplication of teaching positions, where a teacher employed full-time by the religious organization was hired by the public school district to teach additional subjects in the before-school or after-school Community Education Program. It also showed up in the questionable hiring practices of the public school district which produced Shared

Time teachers who were previously employed by a church school and who, as newly-hired public school teachers, were sent back to those same religious schools to teach the very same students. Despite the obvious potential for such a teacher to inject religious content into her "public school" classes, Petitioner School District steadfastly insisted that none of these Shared Time or Community Education classes was, or should be, monitored for religious content.

If classes in physical education, art, music, reading, math, and industrial arts can be delivered by the public school district to the sites of religious schools agreeably with the Establishment Clause, what reasoning would prevent delivery of classes in English, Algebra, Geometry, Latin, Chemistry, Physics, and Government? If this Court decides that any academic subjects may be provided by the government on the site of and in the buildings owned and operated by religious organizations, thereafter there is no place to stop short of the public shouldering the entire schedule of academic classes offered in religious schools. Justice Clark expressed Respondents' argument well in these words:

> "The breach of neutrality that is today a trickling stream may all too soon become a raging torrent and, in the words of Madison, 'it is proper to take alarm at the first experiment on our liberties'." *Abington School District v. Schempp,* 374 U.S. 203, 225 (1963).

In further developing that argument, Respondents point out that the challenged programs, if sanctioned by this Court, would lead to a dual system of public schools wherein the children in one of the companion systems are segregated according to religion and, probably, according to race as well. The Sixth Circuit Court of Appeals called attention to this important aspect of the case at

40a. (718 Fed 2d, at 1406). Respondents submit that the uniquely *public* function of this Nation's public school system is on the line in this case, a function which has provided strong impetus to unification of our peoples despite the extreme diversity of our religious and ethnic backgrounds. Respondents ask, in argument, whether we are about to turn our backs on that system of free, public schools which has made our Nation the envy of the world and, despite the luxury of nearly 200 years without religious strife and turmmoil, return to a program of government sponsorship and subsidy of religion like that existing in Northern Ireland where the government supports both Catholic and Protestant schools and where the entire society is segregated according to religion from the cradle to the grave?

ARGUMENT

I.

Respondents proved by a great volume of evidence that the nonpublic schools receiving shared time and community education programs from Grand Rapids school district are pervasively sectarian.

The Supreme Court of the United States has never adopted a specific "profile" of a pervasively sectarian school. At page 767 of *Nyquist, infra,* the Court listed eight factors which could impact such a consideration, but then commented, "Of course, the characteristics of individual schools may vary widely from that profile." In *Meek v. Pittenger,* 421 U.S. 349, 356 (1975), the Court listed ten factors taken from the Complaint of Plaintiffs. In *Wolman v. Walter,* 433 U.S. 229, 234 (1977), there is no listing of any special factors or criteria, but the Court discusses various features of the sectarian schools involved in the case and at page 235 adopts the District Court's conclusion:

> Although the stipulations of the parties evidence several significant points of distinction, the character of these schools is substantially comparable to that of the schools involved in *Lemon v. Kurtzman*, 403 U.S. 602, 615-618 . . . (1971). 417 F. Supp., at 1116.

The only "test" adopted by the Supreme Court is that contained in *Hunt v. McNair*, 413 U.S. 734, 743 (1973), where it referred to aid flowing to "an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission."

At trial, Repondents offered, and authenticated by 17 witnesses, about 75 exhibits bearing on this subject. Without intending to be repetitious, Respondents wish to emphasize certain exhibits which were not commented upon by the Courts below.

At Marywood Academy "Catholic beliefs are fully integrated into the total curriculum. Every student participates in daily religious class and weekly Mass or Prayer Service." Also, "Marywood Academy is staffed with dedicated, certified teachers who are committed to Christian education". Exhibit 3 (J.A. 392). It is interesting to note, in connection with that commitment of the Marywood teachers to Christian education, that the curriculum courses listed in the pamphlet include several *Shared Time classes,* particularly Art, Music, and Physical Education.

The Christian School Association has gone out of its way to publicize the sectarian mission of its member schools Exhibit 65 is an advertisement placed in the GRAND RAPIDS PRESS by the Association loudly proclaiming, "CHRISTIAN SCHOOLS BELIEVE THAT GOD MADE EVERYTHING." It continues:

> That's why they see Him in MATHEMATICS . . . and HISTORY . . . and SCIENCE and ENGLISH—and all the other subjects they teach. (J.A. 270).

It is difficult to conceive of a more pointed reference to the Association's philosophy of *integrating religion into the curricu'um.* Secular and sectarian functions are, by admission, inseparably bound together such that aid to one is aid to the other. A Shared Time teacher sent into this strong sectarian environment, particularly a teacher of the Christian Reformed Faith, would find it difficult to perform in a manner contrary to the avowed mission of the Christian school program.

> We need not and do not assume that teachers in parochial schools will be guilty of bad faith or any conscious design to evade the limitations imposed by the statute and the First Amendment. We simply recognize that a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral. *Lemon,* 403 U.S., at 618.

In *Lemon,* the teachers were employed by the parochial schools, whereas they are employed by the public school district here. However, many had been previously employed by the religious schools before taking positions in the Shared Time program, so their commitment to the philosophy of Christian education could easily surface in the atmosphere described above. At the very least, such a teacher placement invites rampant abuse of Petitioners' rule or regulation prohibiting infusion of religious content into the "public school" Shared Time classes.

In *Lemon,* as in the instant case, teachers testified that they did not inject religion into their secular classes. *Lemon,* page 618. But in both *Lemon* and *Meek* the Court found that the strong potential for abuse required "a comprehensive, discriminating, and continuing state surveillance" to ensure that the First Amendment was respected.

See, also, Exhibit 82 (J.A. 279), the one-half hour documentary purchased and aired on local TV April 20, 1982 by Grand Rapids Christian School Association. The transcript contains many references to the practice of integrating religion into every subject in the curriculum. (J.A. 412-414). Courses specifically mentioned are Mathematics, Music, and Art, and the impression is conveyed that Christianity is integrated into those classes even though they are "public school" Shared Time offerings.

Petitioners' argument that only the *children* receive educational benefits ignores (1) the supplement given to the salaries of parochial school teachers; (2) the rental payments made direct to the religious schools (J.A. 426, 427), which totalled about $200,000 in 1981-82; (3) the resulting ability of the religious schools to offer a full curriculum to their students (J.A. 144, 145, 147) and to advertise this fact in order to increase enrollments (J.A. 448-454); (4) the prohibitive cost of replacing these programs, according to testimony of several witnesses (J.A. 108, Paragraph 6); and (5) the admitted fact that these courses are annually offered by GRSD to, and accepted by, the *nonpublic schools*. The District has no contact with children or parents in arranging these classes. (J.A. 336-338, 440).

Clearly, the government aid is to *religious schools*, not to individual students who could independently obtain these educational services by merely enrolling part-time or full-time at the public school nearest the residence of each such student. GRSD provides educational services to the religious schools in a manner which enables them to maintain student bodies as homogeneous units without any admixture of foreign elements such as public school students, thereby permitting the religious schools, in the

words of the Court below, "to retain their private religious character". 22a.

The claim made at page 34 of Petitioners' brief that the religious schools are not church-governed is at least misleading. In regard to the Roman Catholic schools, Exhibit 45 (J.A. 262 et seq.) is the Bylaws of the Catholic Interparochial High School Association. It states that the Board of Directors shall consist of 17 members:

> five Catholic priests
> one from the Dominican Sisters
> one from the School of Sisters of Notre Dame
> the Bishop of the Roman Catholic Diocese
> nine lay men or women elected by vote of electors from the parishes assessed for the benefit of the two Catholic High Schools.

It should be obvious from a listing of these qualifications that every person on the Board would be a member of the Roman Catholic Church, and this was confirmed by the testimony of Deacon Dale Hollern. Exhibit 36 lists the lay members, all of whom are Roman Catholic, according to Deacon Hollern, who is the Principal of Catholic Central High School.

Note, also, the provision for "Episcopal Veto" in Article XIV (J.A. 269). The Board does not have final authority upon any matter; the Bishop has such final authority. Thus, the two Catholic High Schools are operated under the total control of the Bishop of the Roman Catholic Church, not by "elected, lay boards" as claimed by Petitioners.

With reference to the Grand Rapids Christian School Association, which controls six Christian schools, Exhibit 77 is the Bylaws of the Association (J.A. 271). Member-

ship in the Association and membership on its governing Board are *restricted* to those who subscribe to a doctrinal "Basis" found in Section 1.3. The final paragraph of this "Basis" deserves special emphasis:

> (e) The Christ proclaimed in the infallible Scriptures is the Redeemer and Renewer of our entire life, thus also of our teaching and learning. *Consequently in a school which seeks to provide a Christian education it is not sufficient that the teachings of Christianity be a separate subject in the curriculum, but the Word of God must be an all-pervading force in the educational program.* (Emphasis supplied).

Immanuel-St. James Lutheran School is supported and run jointly by Immanuel Lutheran and St. James Lutheran Congregations. The responsibility for the educational program rests in the hands of the Joint Board of Education. Each congregation elects three of its members to serve on the Board. The pastors, principal, and assistant principal are advisory members. Page 7 of Exhibit 18 (J.A. 419). Again, as with the Catholic and Christian School Programs described above, voting control is such that it is highly unlikely that a non-Lutheran would ever become a member of this Board.

The claim of Petitioners that these schools do not limit student admissions on the basis of religion is also a misrepresentation of the evidence. Of the 40 religious schools, only three were revealed as having any significant religious minority in the student body. (J.A. 121, 137, 394).

Exhibit 68 is an Application for Admission to a school of the Association. Note that it requires the parent to attest that he is either a member of the Association and subscribes to the "Basis Statement" or that "we do concur that our child(ren) shall be taught according to the principles contained therein". Certainly, such an application imposes religious restrictions upon the admission of students, contrary to the statement of the Superintendent of the Christian Schools at J.A. 136.

Exhibits 59-64 also demonstrate the restrictions upon admission to Christian Schools. These exhibits are four-page hand-out literature briefly describing the program at each of the six Christian schools. All contain slight variations of the following statement:

> All parents, regardless of which church they attend, are welcome to look into the educational program at Sylvan Christian School. *All students whose parents express their commitment to the Christian education offered at Sylvan* are accepted without regard to race, color, national or ethnic origin. (Emphasis added). Exhibit 63 (J.A. 409).

The homogeneous enrollment in Catholic schools is typified by Immaculate Heart of Mary School. Sister Janet Mish, Principal of the School, testified that out of the total enrollment of 424, 410 are Catholic. The 14 non-Catholics are distributed among the nine grades (K-8) in the school. (J.A. 387).

Exhibit 34 is a statistical breakdown of students enrolled in Catholic Central High School. Of the total of 909 students, 877 are Catholic. (J.A. 260). The school does not specifically restrict enrollment to Catholic students, but enrollment statistics indicate little interest on the part of non-Catholics, their number being only 3.5% of the student body.

Petitioners claim at page 34 of their brief that these religious schools do not limit staff hirings on the basis of religion. Again, they encourage the inference that faculties contain significant numbers of persons of minority religions. This is simply not so.

Exhibit 35 is a statistical breakdown of assistant principals and teachers at Catholic Central High School according to religion. (J.A. 261). Of the 46 persons listed, six are members of the clergy of the Roman Catholic Church, 35 are Catholic lay teachers, and five are other denominations. In addition, Principal Dale Hollern, who is not listed, is Roman Catholic.

Sister Janet Mish has 17 teachers on her faculty, including three teaching nuns, all of whom are Catholic. The board of Immaculate Heart of Mary School consists of seven lay persons elected by the parish by ballot and four ex-officio members, including the principal, pastor of the church, and two others. All 11 are Catholic. J.A. 387, paragraphs 11, 15.

Regarding the Lutheran schools, Exhibit 18 at page 8 states "the teachers of Immanuel-St. James Lutheran School meet all the requirements of Synod for its parochial school teachers . . .". Thus, the Lutheran Church-Missouri Synod *does* limit or control staff hirings. (J.A. 423).

The expressed philosophy of Lutheran schools directs integration of religious doctrine into the entire curriculum, including secular courses. "All subjects are taught with a Christian approach and from a Christian point of view." (J.A. 423, Exhibit 18). "A Christian atmosphere permeates the daily instruction of religion, language arts, math, science, art, music, and physical education." (J.A. 425, Exhibit 12). Interestingly, art, music, and physical education are Shared Time "public school" classes which are *supposedly taught by public school teachers.* Do they supply the "Christian atmosphere" which, according to the school's literature, exists in those classes? Certainly, there is the *opportunity* for any Shared Time teacher who wants to do so.

Petitioners claim at page 34 that these religious schools do not inculcate religion, that they provide religious instruction separate and apart from their secular educational function, and that no student is forced to participate in religious worship.

Page 8 of Exhibit 18 (J.A. 423) destroys these claims with respect to the Lutheran schools. Clearly, that page directs an element of coercion in the participation of every student, *even non-member children,* in religious instruction, Confirmation classes, etc.

Regarding the Catholic schools, page 3 of Exhibits 21 and 22 (J.A. 239) demonstrates the dominating role of religion and religious instruction in the curriculum at Catholic Central High School. Out of a total of 21 units required for graduation, four are in religious education. For comparison, Math is only two units, Social Studies two units, and Science one unit. On the same page 3, note that "four years of daily attendance in a Religion class offered at Catholic Central High School is required of all students who attend Catholic Central High School." There is an exception to this policy, but Principal Hollern testified that few students request the exemption.

Without detailing expressions in the other Exhibits which disprove Petitioners' claims stated at page 34, Respondents believe that Sister Marie Heyda expressed it well in her 104-page book "Catholic Central and West Catholic High Schools, a History of Diocesan Venture 1906-1981" at page 80:

> Certainly religion and the values of the spiritual life must always be an integral part of the atmosphere of the Catholic high school for in the modern age *they are the only reason for its being.* (Emphasis added) Exhibit 20.

II.

Schools which are pervasively sectarian provide an integrated secular and religious education, and any substantial government aid to the educational function necessarily results in impermissible aid to the sectarian school enterprise as a whole, in violation of the Establishment Clause.

The opinion of the Court below discusses and compares lower Court decisions which involved lease arrangements similar to that in the instant case, reaching the conclusion that it is substantially similar to lease programs invalidated in four U. S. District Court cases decided between 1972 and 1980, including *Americans United for Separation of Church and State v. Porter, supra.* 22a, 23a. Respondents were able to find only one decision involving a lease program conducted by public authorities in sectarian schools which does not comport with this line of authority, that being *Citizens to Advance Public Education v. State Superintendent of Public Instruction,* 65 Mich. App. 168 (1975), 237 N.W.2d 232, (Leave to appeal denied, 397 Mich. 854). Even there, the Court acknowledged in a footnote at page 180 that its decision did not harmonize with the weight of case authority.

One feature of this program noted by the Court below at 31a deserves emphasis:

> . . . The record also discloses that no evidence was offered by Defendants that any of the participating students come from public schools. As a matter of fact, one witness admitted that a public school student would not be permitted to enroll in a Shared Time class even though that program was "public". Though Defendants claim the Shared Time program is available to all students, the record is abundantly clear that only nonpublic school students wearing the cloak of a "public school student" can enroll in it.

As is stated in the above excerpt, Petitioners claimed in the earlier phases of this case that Shared Time classes were "open to all students, regardless of such students' school of primary attendance." Proposed Findings of Fact of Defendants and Intervenors, paragraph 139 (J.A. 326). It was, and is, important for Petitioners to establish this point in order to make even the faintest assertion that these are "public school classes" and that the students are "public school students".[1] At the time the program was created by Grand Rapids School District in 1975 there was an awareness of the rules set forth by the Michigan Supreme Court in *Traverse City School District v. Attorney General,* 384 Mich. 390, 185 N.W.2d 9 (1971), relating to Shared Time at the public school (Id. at 412), Shared Time on leased premises (Id. at 415), and Shared Time at the nonpublic school (Id. at 415). As to the latter two, the Michigan Supreme Court specifically imposed the requirement that Shared Time courses must be "open to all eligible to attend a public school". Consequently, in drafting its lease for Shared Time classrooms in religious schools, GRSD specified on page 1 that the leased property "is open to all students eligible to attend public schools". (J.A. 202).

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[1]Another hurdle in the path of masquerading these children as "public school students" is found in the uniforms they are required to wear. Exh. 1, page 8; Exh. 4, page 5; Exh. 6, page 6. Neither GRSD nor the several religious schools provide an exemption from the "Dress Code" while the child is in "public school" Shared Time or Community Education classes. Does he nonetheless achieve transition to the status of "public school student" while wearing the uniform required by the religious school?

Of course, merely reciting in a lease that the classes are open to all students eligible to attend a public school does not make them available to such students. There was no evidence that these programs were designed to serve, or did serve, public school students. Indeed, the contrary was true; they were designed to serve nonpublic school students. (J.A. 457, paragraph 184). Interestingly, Petitioners no longer deny this, and their Brief does not even mention the point. Instead, they now claim the classes are conducted "under conditions of public school control". Respondents have discussed that claim in Section IIIB infra in this Brief.

Where it appears that *all* of the students who benefit from the Shared Time classes are enrolled in the sectarian school for the balance of their courses, it becomes obvious that the program is designed, not as a benefit to *children,* who could receive the classes simply by going to a public school, but to channel taxpayer funds to the *sectarian school.* This important point was highlighted in *State of Nebraska ex rel School District of Hartington v. Nebraska State Board of Education,* 188 Neb. 1, 195 N.W.2d 161, cert. denied, 409 U.S. 921 (1972), where the lease program was upheld by the Nebraska Supreme Court and, in effect, by the United States Supreme Court in denying certiorari. The Opinion of Justice Brennan and the dissenting Opinion of Justice Douglas make it clear that "students from both the public and the private school would attend these classes" held in two classrooms leased by Hartington Public School District from the Cedar Catholic High School. Indeed, Justice Brennan specifies the exact number—91 public school and 48 parochial school children. Thus, a good faith, arms-length lease of space in a parochial school was upheld *where the feature of "student body identity" was found not to exist.*

With the exception of *Everson v. Board of Education,* 330 U.S. 1 (1947); *Board of Education v. Allen,* 392 U.S. 236 (1968); and *Mueller v. Allen,* 103 S.Ct. 3062 (1983), which upheld, respectively, transportation and textbook aid to church schools and income tax deductions for tuition and other school expenses, the decisions of this Court, at least with reference to elementary and secondary schools, have consistently rejected efforts to channel tax-raised funds to church schools. The principal, landmark cases along that route have been the following:

In *Lemon v. Kurtzman,* 403 U.S. 602 (1971), the Court invalidated a purchase-of-secular-services statute.

In *Earley v. DiCenso,* 403 U.S. 602 (1971), it held unconstitutional a teacher salary supplement law.

In *Sanders v. Johnson,* 403 U.S. 955 (1971), it affirmed a lower Court opinion which invalidated a purchase-of-secular-services program similar to *Lemon, supra.*

In *Committee for Public Education and Religious Liberty v. Nyquist,* 413 U.S. 756 (1973), it invalidated a tuition reimbursement law, a tax credit law, and a law giving maintenance and repair grants to parochial schools.

In *Sloan v. Lemon,* 413 U.S. 825 (1973), it invalidated a tuition reimbursement law.

In *Essex v. Wolman,* 409 U.S. 808 (1973), it affirmed without opinion a District Court decision ruling unconstitutional a general tuition grant law.

In *Grit v. Wolman,* 413 U.S. 901 (1973), it affirmed without opinion a District Court decision barring tax credits for parents of parochial school pupils.

In *Brusca v. State Board of Education,* 405 U.S. 1050 (1972), it affirmed a holding that exclusion of parochial schools from tax-funding of education did not violate con-

stitutional rights of parents sending children to such schools.

In *Franchise Tax Board v. United Americans for Public Schools,* 419 U.S. 890 (1974), it affirmed a District Court decision invalidating tax reductions for parents of parochial school pupils.

In *Luetkemeyer v. Kaufman,* 419 U.S. 888 (1974), it affirmed a District Court decision upholding a Missouri law limiting free transportation to pupils attending public schools.

In *Meek v. Pittenger,* 421 U.S. 349 (1975), it invalidated, except in respect to the loan of textbooks, a statute which provided so-called auxiliary services to parochial schools.

In *Wolman v. Essex,* 421 U.S. 982 (1975), it reversed and remanded a District Court decision upholding the constitutionality of an Ohio auxiliary services law, whereupon the District Court determined that it was not constitutionally distinguishable from the statute in *Meek* and adjudged it unconstitutional.

Meek was decided on May 19, 1975; *Wolman v. Essex* on May 27, 1975. Three months later, Ohio enacted a new auxiliary services law which was invalidated as to instructional services and equipment in *Wolman v. Walter,* 433 U.S. 229 (1977).

The instant case follows the change-in-form-but-not-in-substance pattern outlined above. The substance or end-result of the lease device, which is designed to create a "pocket" public school, is virtually identical to the purchase-of-services device outlawed in *Lemon v. Kurtzman, supra,* and the salary supplement method in *Earley.* GRSD has signed a lease which gives it access to the premises

of a parochial school. And the purpose for which this legalistic access is sought is to confer substantial financial benefits upon the parochial school in the form of employing and paying from tax funds the teachers who teach secular subjects in leased classrooms of the parochial school building.

The Community Education program here is almost identical to Rhode Island's Salary Supplement Law struck down in *Earley.* In that case the State paid to the parochial school teacher a percentage of the full-time salary, based upon the portion of time devoted to teaching of "secular subjects". In the instant case, the parochial school teachers are employed by GRSD to teach specific "secular subjects" after regular school hours. (J.A. 348). The teacher subsidy in *Earley* was a percentage up to 15% of the teacher's existing salary; in the instant case it is a weekly or hourly rate of pay based upon services performed. See J.A. 434-436.

The salaries of many administration personnel at religious schools are also supplemented by employing them in the *administration* of the Community Education program. (J.A. 434-440). Thus, Sister Regina Mary Godell, Assistant Principal at Immaculate Heart of Mary School, also runs the Community Education program at that school as an employee of GRSD (paragraph 116 at J.A. 434); Edward Wagner, Principal of West Catholic High School, is paid $3,000 per year as "Coodinator" of GRSD's Community Education program at that school (Id. paragraph 118); the same combination of positions is held by Deacon Dale Hollern, Principal of Catholic Central High School, and his Assistant Principal (Id., paragraph 120); the same situation exists in Sacred Heart and St. Stephen

Catholic elementary schools. (Id., paragraphs 122, 123). The teacher salary supplement has, thus, progressed to a *merger of administrative functions,* wherein persons employed in the administration of parochial schools have become employed by GRSD to administer its programs. Entanglement in respect to teaching personnel has been extended to the administrative level, so that a single person is found to be in charge of both sectarian school affairs and "public school" programs. The cooperative dependency which indicates the attainment of forbidden administrative entanglement has approached the status of an *actual merger* of the two systems. In the oft-repeated quotation from *Everson* which spells out the impact of the Establishment Clause, it is stated that "neither a state nor the federal government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa." 330 U.S., at 15. Here, we have an aggravated violation of that principle.

The Supreme Court has analyzed recent cases in this field by application of a three-pronged test. (See *Committee for Public Education v. Nyquist, supra*). First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster "an excessive government entanglement with religion."

In analyzing this program under the second prong of the test, it is important to note that the Court below found that the schools receiving these classes are pervasively sectarian in the sense that they are operated "with the advancement of their various religious faiths as a primary purpose." 35a, 10a. Various exhibits of Respondents un-

derline the extent of integration of religious principles into the total educational curriculum of the sectarian schools. In schools where secular and sectarian activities cannot be separated, the aid given by GRSD constitutes direct subsidy to the religious institutions, in violation of the Establishment Clause of the First Amendment. Supreme Court cases relied on to support this proposition are discussed and analyzed by District Judge Enslen at pages 97a-105a. See, especially, the exhaustive analysis of *Meek v. Pittenger, supra,* and *Wolman v. Walter, supra,* at pages 99a-105a.

The discussion at pages 245-246 of *Wolman* is particularly appropriate to the facts here. The Court approved therapeutic, guidance, and remedial services for nonpublic students *when performed in public schools, in public centers, or in mobile units located off the nonpublic school premises.* The discussion in the Court's Opinion centers around the possibility that mobile units serving only nonpublic school students might be located in close proximity to a sectarian school and "might operate merely as an annex of the school or schools it services". The Court responded to that expressed fear:

> At the outset, we note that in its present posture the case does not properly present any issue concerning the use of a public facility as an adjunct of a sectarian educational enterprise. The District Court construed the statute, as do we, to authorize services only on sites that are "neither physically nor educationally identified with the functions of the nonpublic school." 417 F. Supp., at 1123. Thus, the services are to be offered under circumstances that reflect their religious neutrality.

In the instant case, no such "religious neutrality" is possible because Shared Time classes are conducted *with-*

in the sectarian school building. The inference in *Wolman* is clear that such a factual circumstance would have invalidated the therapeutic, guidance, and remedial services in issue in that case.

To the same effect is *Wheeler v. Barrera,* 417 U.S. 402, 428 (1974), where Justice Powell in his concurring Opinion said:

> I would have serious misgivings about the constitutionality of a statute that required the utilization of public school teachers in sectarian schools.

One additional point was touched upon by District Judge Enslen at page 107a, but was not otherwise developed in his Opinion. In discussing the complete identity of the student body in the "public school" classes and the nonpublic schools, he said, "Since there are, in fact, no public school students participating in the instant programs, the nonpublic schools are permitted to retain their private religious character."

Judge Enslen has called attention to a whole new facet of this Shared Time program inside sectarian school buildings, namely, the *segregation* aspect of it. If these Shared Time and Community Education classes conducted by GRSD within sectarian school buildings are part of its total public school program, the school district has established and is maintaining a dual public school system which segregates students according to religion, in violation of the Equal Protection Clause of the Fourteenth Amendment. Also, since that dual public school system would, in the words of Judge Enslen at page 107a, permit the nonpublic schools "to retain their private religious character" while receiving government benefits in the form of public educational services, the program provides sig-

nificant aid to the religious mission of the sectarian schools in violation of the Establishment Clause.

The "private religious character" of religious schools cannot be maintained in classes where nonpublic students and public school students are *mixed together.* Such mixture does not occur in the Grand Rapids program, but it *did* exist in the lease program approved in *Hartington, supra,* discussed above in this Brief.

Further evidence that the aid involved here is significant in amount and direct to the religious school is found in the fact that the expense of providing certain courses taught at the religious schools was transferred to the taxpayers in the course of implementing these programs. For example, Physical Education is a Shared Time class at the non-public schools. As stated by the Shared Time Physical Education Supervisor, "In all cases the service we offer in terms of its scope exceeds the service that was otherwise available to the nonpublic students." (J.A. 83). Thus, it appears the Shared Time program improved the scope and quality of physical education classes previously available.

The value of these classes to the private schools was stated over and again by various school administrators. (J.A. 451-454). The fact that many of the course offerings may be supplementary to the core curriculum may render them more beneficial to the religious school than if they duplicate or replace existing classes, as the effect is to broaden the curriculum and thereby attract students seeking a wider choice of classes and careers.

Respondents have charged that this program enables the Public School District to gradually take over the academic program of the religious schools. Note, in Exhibits

21 and 22 the subtle way this is accomplished. (Paragraph 165 of J.A. 450). Those exhibits are successive annual editions of the Curriculum Guide of Catholic Central High School. At page 6-3 of Exhibit 21 (1981-82 Edition), "Yearbook 522" is a course offered by the staff of that high school; but at page 6-3 of Exhibit 22 (1982-83 Edition), that same course, which produces the annual yearbook of the high school, has become "Yearbook 922" and is offered in the Shared Time program. In the next edition what is to prevent transfer to the taxpayers, under the title of a journalism course, of responsibility for composing, editing, and printing the Curriculum Guide itself, which contains four pages devoted to the Religion Department of the school?

Note, also, that "Yearbook" is an after-school Community Education class at Holy Spirit School and Oakdale Christian School. (J.A. 207, 210, 213). If the programs in issue are permitted to continue, how long will it be before the taxpayers are publishing the yearbook of every religious school in Grand Rapids and Kent County?

How could the government involve itself more intrusively in the operation of a private, religious educational institution than to take over the publication of the annual yearbook of that school? At this point we must certainly have reached or exceeded the limit of governmental participation in the affairs of a religious organization.

III.

The program in issue produced excessive administrative and personnel entanglement, as well as political entanglement, between government and religion, in violation of the establishment clause.

The third prong of the *Nyquist supra,* test, the potential for excessive government entanglement with religion, provides an even stronger reason for invalidating these programs. This facet is confronted at 30a-34a of the Opinion below. These classes had become so clearly an integral part of the curriculum of the sectarian schools that a cooperative dependency (entanglement) became inevitable. Given the increase in the size of the program during the past six years, including the number of students, number of teachers, and the huge increase in cost to Michigan's taxpayers, it becomes logical to envision a developing administrative and personnel *merger* between religious schools and public schools within the GRSD. The time to arrest this merger is before it becomes cemented to the point where it cannot be easily dismantled.

Respondents have addressed entanglement in the preceding section and other portions of this Brief. Exhibits which exemplify this element are described at J.A. 425-444.

In addition to the entanglement of teaching personnel and administrative functions, the Court below found a potential for impermissible "political divisiveness", also known as political entanglement. 26a-29a. The exhibit discussed there is found at J.A. 245, 246. This fourth prong of the test was first enunciated in *Lemon v. Kurtzman, supra,* 403 U.S., at 622. When government action in a sensitive area causes political division along religious lines, this has been held to be a "warning signal" of constitutionally impermissible activity. *Nyquist, supra,* at 794.

Another "warning signal" was sounded March 7, 1984 when the State Board of Education of the State of Michigan, which is one of the Petitioners, voted 5-2 to discontinue its participation in this case. See Note 6 at page 4 of Petitioners' Brief. A mere "*potential* for political divisiveness" has become a *reality*. The elected members of the state agency having responsibility for supervision and leadership of public education in Michigan have divided on the issue of state taxpayer funding of teaching services performed on the site of religious schools. At the next election of members of the State Board of Education, each candidate may be required to announce a position, and the electorate can be expected to divide on the issue. For each voter, the point of division may be whether his religious denomination expects to benefit from the program. This is precisely the kind of political activity which the Establishment Clause was designed to prevent. *Lemon, supra,* 403 U.S., at 622. Madison wrote of this potential for religious competition:

> "It (the Bill for religious assessments) will destroy that moderation and harmony which the forbearance of our laws to intermeddle with religion, has produced amongst its several sects . . . . The very appearance of the Bill has transformed that 'Christian forbearance, love and charity', which of late mutually prevailed, into animosities and jealousies, which may not soon be appeased. What mischiefs may not be dreaded should this enemy to the public quiet be armed with the force of a law?" *Memorial and Remonstrance Against Religious Assessments* (1785), paragraph 11.

A. With reference to classes conducted by the public school district on the site of religious schools, failure to monitor for religious content invites rampant abuse of restrictions by teachers who may have a personal religious commitment to the particular religious school or its denomination of religion.

Petitioners have urged at pages 18 and 24 of their Brief that there is no proof of any attempt on the part of a Shared Time teacher to inject religious content into a Shared Time "public school" course. However, with these classes being conducted in the sectarian environment of the religious schools, it is unlikely that infusion of religious content would ever be reported outside the classrooms. The reasons are as follows:

1. Student bodies of these schools are extremely homogeneous in religious affiliation. (See Argument, Part I, this Brief). It would be unusual to find more than one non-Catholic in any classroom of a Catholic school, or more than one non-Lutheran in any classroom in a Lutheran school. In such a school environment where religion and religious exercises are a standard part of the classroom routine, it is not likely that any student would notice or object to the same kind of religious content in *Shared Time classes.*

The atmosphere of a school which is owned and operated by the public school district is entirely different. Classes are attended by students of all religions and no religion. Also, members of the public have ready access to the building and to classrooms within the building so that they may monitor classes conducted therein. If any religious material finds its way into the curriculum of such a public school, it is immediately reported by a student, by a parent whose child has reported it to him, or

by a member of the public who may have visited the classroom. This was exactly what occurred in *Abington School District v. Schempp, supra.* Edward Lewis Schempp, his wife, Sidney Schempp, and their children, Roger and Donna, were all members of the Unitarian Church. They objected to reading of Bible verses which conveyed literal meanings contrary to their religious beliefs. The religious diversity of a public school student body makes it impossible to conceal for long any activity which might constitute a violation of church-state separation.

2. The lease, received as Exhibit 74 and Exhibit HHH (J.A. 202), specifies that lessee is the Grand Rapids Public Schools and gives a right to access to *lessee and its public school employees.*

None of the leased buildings was marked on the exterior as a "public school" or "public school annex" or in any other manner to indicate to a member of the public that he or she would be welcome on the premises. As a matter of common sense, a member of the general public would be a mere trespasser upon this private property, having no right to enter or in any way monitor classes conducted there. Thus, it is not surprising that there is no reported instance of any member of the public monitoring a class or reporting or complaining regarding its subject matter.

3. In the escalating entanglement which marked this Shared Time Program over a period of several years, Respondents were successful in identifying 13 Shared Time teachers who were employed by GRSD after previously being employed by the religious schools involved. This was 10% of the total teachers in the daytime Shared Time Program. (J.A. 193). Many more, about 300, were employed full-time by the religious schools and part-time

in before-school or after-school community education "public school" classes at the various religious schools. A discussion of this factor appears in the Opinion of the Court below at 31a-34a. Nevertheless, a more detailed analysis of this feature is necessary to show the close personal contacts which existed between these "public school" teachers and the sectarian schools and their students.

Exhibit 51 is a nine-page "Student Handbook" distributed by Millbrook Christian School for the year 1981-82. Page 2 contains a "staff list" of teachers in the elementary and junior high. Three teachers on the list, being Mrs. Gwen Pott, Mr. Clare Vredeveld, and Mrs. Shirley VanWoerkom, are public school Shared Time teachers, but they are not so identified on this list; to the contrary, it would appear that all of the listed persons are employed by and responsible to Millbrook Christian School. (J.A. 442, paragraph 139). The same is true of classroom schedules shown at pages 5 and 6, no distinction being made between Shared Time classes and other classes conducted by the religious school. Page 7 is a sketch showing the location of every teacher on the staff. Again, there is no distinction drawn between Shared Time teachers and other teachers. A person examining this Exhibit quickly reaches the conclusion that GRSD has achieved an administrative and teacher merger with the religious school in the process of extending its services to that school.

The same conclusion is compelled by examination of Exhibit 47, the staff handbook of Seymour Christian School for the year 1981. The teachers are listed in the "staff directory" at page 2, and four of these are Shared Time teachers employed by GRSD, being Norma Bratt,

Charlotte DeVries, Gwen Pott, and Dick VanderKamp. There is no asterisk identifying them as public school teachers, and a person reading the list would conclude that they are on the staff of Seymour Christian School. (J.A. 443, paragraph 141). Again, page 5 contains a drawing of the layout of the building, with a numbering system to identify the placement of teachers in various classrooms. The names of two of the above teachers appear, as well as the location of their rooms, but no mention is made of "public school" teachers or "public school" classrooms. Other exhibits with similar content are 48, 50, 52, 53, 54, 55. (J.A. 422, 443). Many of these public school Shared Time teachers were previously employed by the very same religious school, teaching the same subject to the same students. Is it reasonable to presume that such a teacher, who previously led a prayer at the outset of the school day or at the opening of a class, would be able to gracefully forego such a perfunctory part of the routine of the religious school? At least, the circumstances are such that GRSD should have recognized a potential for abuse of its regulations. Even so, no monitoring for religious content was ever conducted!

In *Meek v. Pittenger*, supra, the teachers were employed by the public school district to provide auxiliary educational services in sectarian schools. There was no evidence that any of the teachers had been previously employed by the religious schools. At page 370, the Court said:

> "That Act 194 authorizes state-funding of teachers only for remedial and exceptional students, and not for normal students participating in the core curriculum, does not distinguish this case from *Early v. DiCenso* and *Lemon v. Kurtzman, supra*. Whether the

> subject is 'remedial reading', 'advanced reading', or simply 'reading', a teacher remains a teacher, and the danger that religious doctrine will become intertwined with secular instruction persists." 421 U.S., at 370.

And at page 371, the Court continues:

> "The fact that the teachers and counselors providing auxiliary services are employees of the public intermediate unit, rather than of the church-related schools in which they work, does not substantially eliminate the need for continuing surveillance. To be sure, auxiliary services personnel, because not employed by the non-public schools, are not directly subject to the discipline of a religious authority. *Cf. Lemon v. Kurtzman,* 403 U.S., at 618. But they are performing important educational services in schools in which education is an integral part of the dominant sectarian mission and in which an atmosphere dedicated to the advancement of religious belief is constantly maintained. See *Id.*, at 618-619. The potential for impermissible fostering of religion under these circumstances, although somewhat reduced, is nonetheless present. To be certain that auxiliary teachers remain religiously neutral, as the Constitution demands, the State would have to impose limitations on the activities of auxiliary personnel and then engage in some form of continuing surveillance to ensure that those restrictions were being followed." 421 U.S., at 371.

The failure of GRSD to monitor these classes invited rampant abuse of its rules prohibiting infusion of religious subject matter.

B. Far from being under public school control, these classes conducted within the buildings operated by religious schools are under predominant control of administrative personnel of those religious schools.

The Michigan Supreme Court in 1971 spelled out the necessary features of a Shared Time program conducted

on leased premises or at the nonpublic school. *Traverse City School District v. Attorney General*, supra. One requirement was that it must be "under the authority, control and operation of the public school system by public school personnel". Another was that it must be "open to all eligible to attend a public school". 185 N.W.2d at 19. The latter requirement is not even discussed in Petitioners' Brief and it is apparent they are no longer claiming this factor exists, in the wake of irrefutable evidence that not one single public school student ever has attended even one of the classes involved in this case. (J.A. 431-433). However, Petitioners continue to claim these classes are conducted "under conditions of public school control", even though the following features have evolved:

1. GRSD has no control over enrollment. It merely accepts students delivered to its "public school" classes by the religious school, some of whom come from outside the boundaries of the District, or even outside the county. (J.A. 457). By contrast, attendance at school buildings owned by the District is strictly regulated by geographic attendance boundaries.

2. There is no effort to distinguish resident from non-resident students. All children enrolled at the religious school are eligible for Shared Time classes. By contrast, a non-resident student may apply for admittance to a public school operated by GRSD and, if such application is granted, he is admitted as a *tuition* student. (J.A. 456, 457).

3. GRSD has no control over the days when the religious school will be open, the hours it will be open, or the holidays it will observe (including religious holidays).

4. GRSD has no control over parent-teacher conferences (J.A. 443, paragraph 143, and J.A. 445, paragraph

151), assemblies, extra-curricular activities of its "public school" students, or any non-academic events at the Shared Time "public school". If it wants to assemble all of its "public school" students, this must be arranged through the administration of the religious school.

5. GRSD has no administrative personnel on site. It relies entirely on the administration of the religious school to produce a student body for classes and to supply all auxillary educational needs such as library facilities and parent-teacher contacts.

6. GRSD has exercised only limited control over the hiring of teachers and the assignment of these teachers to specific schools. Indeed, the religious schools seem to have exerted effective control and influence in acquiring for their "public school" Shared Time classes specific teachers who were previously employed by that particular religious school. Now, under the title of "public school Shared Time teacher", they are back teaching the same classes in the same building to the same students. (J.A. 433 et seq.).

7. The lack of District control in the personnel area has produced extraordinary overlapping and entanglement between the public school administration and that of the religious schools. (J.A. 433 et seq.). In many instances, teachers at the religious schools wear several "hats", being employed simultaneously by GRSD and by the religious school. (J.A. 437, 438). Considering the large number of public school buildings and religious school buildings listed at J.A. 215-220, assignment of so many Shared Time teachers back to school buildings where they had taught as employees of the religious school could not be mere coincidence; clearly, *the religious school organiza-*

tions maintained considerable control over assignment of Shared Time teachers so that they were able to acquire those who were philosophically and spiritually in harmony with the sectarian environment of the particular school.

8. GRSD did not monitor these classes for religious content and, therefore, exercised no control over the infusion of sectarian flavor. Certainly, classes of the character described in the two preceding paragraphs *required* surveillance, but the firm rule of GRSD was that no classes were to be monitored for religious content. (J.A. 429-431, paragraphs 100, 101, 103, 106). Note in paragraph 103 that the Community Education Coordinators and aides who had immediate responsibility in this sensitive area were employed part-time by GRSD *and full-time by the religious schools.* In addition, many of the principals of religious schools were also *teachers* in the Community Education Program. What would be the degree of likelihood that the Principal of St. Stephen's School while teaching a Community Education class to his students in the religious environment of his school (J.A. 394, 395, 437) would attempt to advance the "spiritual development" of the children by means of traditional prayers and exercises in keeping with the mission of the church? And still, GRSD maintained a policy of not monitoring for religious content!

9. GRSD was unable to control or prevent the printing of Christian School handbooks such as Exhibits 48, 50, 51, 52 which list many of its Shared Time teachers on the teaching staff of Millbrook Christian School, Seymour Christian School, and Creston-Mayfield Christian School. (J.A. 442, 443). These teachers, most being previous employees of the Christian School Association, had become

so much a part of the overall atmosphere of the religious schools that their transfer to the public school payroll was not even noted in the annual publication of the booklets. As to such a teacher who was suddenly hired away from Millbrook Christian School by GRSD, then assigned right back to Millbrook to teach the same subject (now a Shared Time class) to the same students, what would be the degree of likelihood that religious viewpoints and subject matter would be integrated with academic? This teacher would be familiar with the expressed mission which requires that "in a school which seeks to provide a Christian education it is not sufficient that the teachings of Christianity be a separate subject in the curriculum, but the Word of God must be an all-pervading force in the educational program". (J.A. 404, 405). And still, there was no monitoring for religious content!

10. GRSD has transferred many administrative duties and functions to persons employed by the religious schools in administrative positions. (J.A. 434-439, paragraphs 118, 120, 122, 123, 130). The Director of the Shared Time program testified that the principal of one of the Catholic high schools would be his "first choice" for Community Education Coordinator at that school, *indicating a policy decision to place such persons in supervisory positions over public education programs.* This is not mere administrative entanglement of the kind which caused this Court to strike down the programs in *Lemon, Meek,* and *Wolman;* this goes further and involves a joinder of the public and nonpublic systems at the planning and supervisory levels of administration. When entanglement reaches this level, it becomes proper to inquire whether the church is now operating the public schools, or whether the government has assumed control of church institu-

tions. Either way, the program comes into direct conflict with the pronouncement from *Everson* that "neither a state nor the federal government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa". 330 U.S., at 15.

The above ten-point analysis of the program in issue demonstrates that, contrary to Petitioners' claim, it is not conducted "under conditions of public school control". Neither is it "open to all eligible to attend a public school". Thus, *it lacks two essential ingredients of a public school program.*

Respondents submit that this program was designed to augment the curriculum of the religious schools and to supplement the salaries of teachers and administrators employed by religious schools. In its actual operation it performs those functions, both of which are prohibited by the Establishment Clause.

IV.

If the Shared Time arrangement conducted within church schools is truly a public school program, the district has established a dual system of public schools, one system in which children of all races, religions, and ethnic origins are mixed together in the tradition of American public education, and a second in which children are segregated according to religion.

At trial Respondents proved by many witnesses and exhibits the pervasive sectarian character of the non-public schools receiving Shared Time services. These schools have high concentrations of children professing the religious affiliation of the school itself. See J.A. 455, paragraphs 177-179. Also, paragraph 60 at J.A. 408. The Grand Rapids Christian School Association operates six schools, including a high school. One of these is Oakdale Eelemen-

tary School located in the so-called "inner city" portion of Grand Rapids. The neighborhood is about 75% minority (black), but the student body of the Christian school is only 25% minority. Directly across the street from this Christian school is Alexander Public Elementary School which is about 90% minority, according to testimony of Ronald Boss, Principal of Oakdale Christian School. (J.A. 456).

Exhibit 77 (J.A. 271) spells out the religious doctrine taught in the Christian schools. Exhibit 68 (J.A. 405) is an application for admission to the schools of the Association. It requires the parent either to subscribe to that doctrinal "basis" or agree to have his children taught according to the basic principles. This has the effect of restricting admission to those who will accept the doctrine spelled out in the "basis", and it produces a completely homogeneous student body, based upon the religious principles referred to in the Application for Admission.

This is true, also, of the Catholic schools. (J.A. 455, paragraphs 178, 179). The two Catholic high schools are 96.5% and 98% Catholic in enrollment. Of the 23 Catholic elementary schools receiving Shared Time services, only two were identified as having any significant number of non-Catholic students. (J.A. 121, 394). The Superintendent of the Gra d Rapids Catholic Schools testified that, as to twelve inner-city Catholic schools in Grand Rapids, non-Catholics represent 15% of the student body. (J.A. 113). Among the remaining eleven schools, many are more than 95% Catholic. See J.A. 456 as to Sacred Heart School and Immaculate Heart of Mary School.

If these religiously-segregated schools are held to be "public schools" in the sense that GRSD can provide its

educational services to them in the same way it provides services in buildings owned and operated by the District, GRSD will have established a dual system of schools. One system will be free, open to all children, and conducted without discrimination as to race, color, or creed. In the second system, "public school" children will be segregated in the various buildings according to religion; those buildings will be owned and controlled by church organizations which will be able to impose religious restrictions on admission to the student body; and they will be able to require attendance at religious activities and exercises within the building.

In one system students will be drawn from within specified attendance boundaries; in the other system there will be no attendance districts or boundaries, and many children will come from outside the public school district. Even so, without payment of any tuition to GRSD, they will qualify for "public school" services because they are enrolled at the religious school. To the contrary, in the traditional public school program if a child enrolls from a residence outside the boundaries of the public school district, his parents are charged tuition.

In the public schools owned and operated by GRSD, a voluntary student Bible study club would not be permitted to meet and conduct its activities on the school campus during the school day. *Johnson v. Huntington Beach Union High School District*, 68 Cal. App. 3d 1 (1977), 137 Cal. Rptr. 43, *cert denied* 434 U.S. 877. Nor could there be organized, school-sponsored prayer or Bible reading. *Engel v. Vitale*, 370 U.S. 421 (1962); *Abington School District v. Schempp, supra.* However, these activities would be permitted without restriction in the Shared Time "public school" system.

Since such a shocking result would make a fool of the law, a decision here in favor of Petitioners must necessarily involve overruling *Huntington Beach, Engel* and *Schempp, supra.* Justice Douglas addressed this dilemma in concurring in *Lemon:*

> "Under these laws there will be vast governmental suppression, surveillance, or meddling in church affairs. . . . school prayers, the daily routine of parochial schools, must go if our decision in *Engel v. Vitale,* 370 U.S. 421, is honored. If it is not honored, then the state has established a religious sect." 403 U.S., at 634.

Another case which must fall with the others is *Tudor v. Board of Education of Rutherford,* 14 N.J. 31, 100 A.2d 857 (1953), *cert. denied* sub nom, *Gideons International v. Tudor,* 348 U.S. 816 (1954), which held that the Establishment Clause prohibits public school participation in the distribution of Gideon Bibles. Clearly, we could not countenance a rule which permits organized distribution of Bibles and other religious materials in Shared Time "public schools" of the district, while at the same time prohibiting such distribution in the traditional public schools of the same district. Likewise, as to the posting of the Ten Commandments in public schools. *Stone v. Graham,* 449 U.S. 39 (1980).

In the continuing future development of this Shared Time concept (or, *reverse* Shared Time, as Respondents term it), if the public school district can, consistently with the Establishment Clause, provide classes in reading, math, art, music, and physical education, what strictures of the Establishment Clause prevent broadening that list to include English, English Literature, Chemistry, and Physics? Clearly, there is no logical place to stop once the district commences supplying any "secular" courses.

Stated another way, if this Shared Time "public school" program passes muster because the classes are "supplementary" or "remedial" or "enrichment", as distinguished from courses in the "core curriculum", each time GRSD adds another such "supplementary" class or takes over such a class already existing in the curriculum of a religious school, it may become necessary for the United States Supreme Court to decide whether GRSD has finally overstepped the hazy line between insignificant governmental accommodation to religion and direct financial aid to the religious institution. Such a fine distinction would breed an avalanche of litigation.

This discussion exemplifies the proposition that when the *principle* of separation is violated, even in a modest, seemingly benign way, the resulting accommodation to sectarian pressures forms the platform for the next, more-instrusive assault upon the principle. Madison warned against this:

> "The freemen of America did not wait till usurped power had strengthened itself by exercise, and entangled the question in precedents. They saw all the consequences in the principle, and they avoided the consequences by denying the principle." *Remonstrance,* paragraph 3.

If this Shared Time program gains Court approval, how could other religious groups resist the temptation to provide day schools for children of their adherents, with the government picking up the tab for many or most of the "secular" courses. Almost certainly, we would see a proliferation of religious schools which would siphon off Methodists, Baptists, Presbyterians, Moslems, Mohamedans, Hindus. In the final stages, those remaining in the public

schools would be the poor, who were without any financial resources to pay the now-diminished tuition at the state-subsidized religious schools, and the unchurched. We would have completed the transition back to a religiously-segregated society similar to that of Northern Ireland where both Catholic and Protestant schools are subsidized by the government. Such a system effectively produces total segregation from the cradle to the grave.

The genius of our nation has been our system of free, public schools. With over 200 recognized religions and denominations of religion, we have nevertheless been able to avoid sectarian strife and competition by the process of educating our young people in an atmosphere of blended racial and religious cultures, with none given any governmental sponsorship or other advantage over the others. The "public school" Shared Time Program involved in this case departs from that American tradition by offering a strong financial advantage and subsidy to any church organization which presently has in place a system of religious day schools. However, if the program is approved by this Court, other church groups which do not presently operate day schools would likely open new schools in order to take advantage of this program of significant government aid to religion.

Since most of these groups would be identified with the Christian religion, at what point along this road would it be acknowledged that the government had "established" the Christian religion? Again, in the words of Madison:

> ". . . it is proper to take alarm at the first experiment on our liberties. . . . who does not see that the same authority which can establish Christianity, in exclusion of all other religions, may establish with the same ease any particular sect of Christians, in exclusion of

> all other sects? That the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?" *Remonstrance,* paragraph 3.

The first step along that road is the one most to be feared, as it countenances and encourages the next and all successive steps, until at last the principle is destroyed and the freedom lost.

The discussion thus far has pertained to dual public school systems in which one of the companion systems is segregated according to *religion.* Consider for a moment the argument made by Justice Douglas at page 632 of his concurring Opinion in *Lemon v. Kurtzman, supra.* He said:

> "Where the governmental activity is the financing of the private school, the various limitations or restraints imposed by the Constitution on state governments come into play. Thus Arkansas as part of its attempt to avoid the consequences of *Brown v. Board of Education,* 347 U.S. 483, 349 U.S. 294, withdrew its financial support from some public schools and sent the funds instead to private schools. That state action was held to violate the Equal Protection Clause. *Aaron v. McKinley,* 173 F. Supp. 944, 952. We affirmed sub nom. *Fabus v. Aaron,* 361 U.S. 197."

We know from the experience of a long line of school desegregation cases that there are individuals and groups in our society who would bring about total segregation of public education according to race if they could find support for that doctrine in the U. S. Constitution. This Shared Time Program, if approved by this Court, would be the perfect vehicle to accomplish that heretofore forbidden objective. If segregationists could gain control of a public school board, as they did in Arkansas in the case

cited by Justice Douglas, they could enter into leases with existing or newly-formed sectarian schools, then commence providing "Shared Time" public school classes to those schools, gradually enlarging the curiculum until a total program of "secular" education was available in those buildings. Most certainly, this would stimulate enrollments in these "public schools". Tuition charges would be modest because the public school district would be picking up the cost of virtually all classes. And, as in the instant case, courses offered at the sites of the religious schools would be identical to those offered in the regular public schools of the district, so the program would merely be an effort by the School District to satisfy "the secular educational needs of all school age children." (Petitioners' Brief, page 42 et seq.).

As additional students were encouraged to transfer into these new "public schools", the District would have established a dual system of public schools, one being the traditional system now enrolling the poor, black, and unchurched, and a second "Shared Time" public school system enrolling mostly white children of middle class parents who could afford the modest tuition.

The racial profile of GRSD, set forth in *Higgins v. Board of Education of the City of Grand Rapids,* 508 F2d 779 (1974), suggests that such an occurrence is possible in Grand Rapids:

> "Grand Rapids is a city lying in the southwest portion of Michigan having a 1970 population of 197,649. It is the county seat of Kent County with a population of 411,044. The Grand Rapids School District is generally coterminous with the city of Grand Rapids.
>
> "The racial composition of the Grand Rapids population has changed materially in recent years, growing from a 1% black population in 1940 to 11.3% in 1970.

In the twenty years from 1950 to 1970 the black population tripled, with the vast majority concentrating within an area that began in and expanded from what is generally referred to as the central city.

"Historically, the Grand Rapids school population has reflected a higher percentage of blacks than that found in the total population of the city. Thus, the non-white school population grew from 2.58% in 1941-42, to 6.52% in 1950-51, to 9.80% in 1954-55, to 15.20% in 1960-61, and to 21.24% in 1968-69. Finally in 1972-73 the black enrollment was 8,459 out of 32,864, representing a percentage of 25.74%. At the elementary level where the black population is greater as a result of recent birth rates the percentage of non-white enrollment increased from 7.2% in 1950 to 18% in 1960 and to 31.2% in 1972. As the district judge assessed these statistics, non-white enrollment in elementary schools increased 351% from 1950 to 1965 and increased another 31.7% from 1965 to 1970. White enrollment increased only 38% from 1950 to 1965. It actually decreased 9% from 1965 to 1970.

"By 1965, 97% of the total non-white elementary school population in Grand Rapids was in attendance at the 11 inner-city schools whose non-white enrollment averaged 83%. By 1970, the percentage of black elementary school children attending these inner-city schools was down from 97% to 85% but by then these schools were on the average 89% black. The figures continued to shift until at the time of trial only 65% of all non-white students were attending the inner-city schools then having an average enrollment of 95% black students." 508 F2d, at 784.

In the instant case, the Court of Appeals considered this aspect in its Opinion at 40A:

> "We recognize, of course, the increasing impact of Supreme Court majority approval of public funding for religiously neutral supplies and services which are provided to all schools, including parochial schools. If, however, what has been adopted by the Grand Rapids School Board were to be added to the list of such approvals, the separation of church and state will be effectively ended in the field of public education. Legislatures in many states are notoriously vulnerable to pressures from religious constituencies. Under such pressure legislatures can be expected to allocate increasing Shared Time or Community Development funds to the point where the great majority of parochial school costs will be carried by taxpayers. The only costs not covered may in time be those specifically allocated to religious services or classes in religious instruction. Constant secular inspection and surveillance of all activities not specifically labeled religious would be required to maintain even a fiction of separation. *Such a result would end public education as a major aspect of the American goal of equality of opportunity.*" 718 F2d, at 1406. (Emphasis added).

GRSD has claimed that it extended these services into sectarian schools in keeping with a policy to provide educational services to the entire community. However, the Michigan Constitution contemplates a less intrusive approach to the attainment of that goal:

> "The legislature shall maintain and support a system of free public elementary and secondary schools as defined by law. Every school district shall provide for the education of its pupils without discrimination as to religion, creed, race, color, or national origin." Art. VIII, Sec. 2, Michigan Constitution of 1963.

Under this provision, the state government is required to set up a system of free public schools; however, neither the state nor any local public school board is required or expected to roam the length and breadth of that district in search of students whose parents have rejected public education and, finding them enrolled in sectarian schools, impose educational services upon those schools

under the guise of "providing educational opportunity for the total community". By Petitioners' admission, these services are already available in the public schools owned and operated by GRSD, and any students who desire the services can acquire them there. To, instead, make use of sectarian institutions to further goals in secular education does violence to the principle that "government may not employ religious means to serve secular interests, however legitimate they may be, at least without the clearest demonstration that nonreligious means will not suffice". *Abington School District v. Schempp,* 374 U.S. 203, 265 (1963).

Petitioners, at page 4 of their Brief, footnote 6, have reported to this Court an interesting development which occurred since the case was accepted for review. On March 7, 1984, one of the named Petitioners, State Board of Education of the State of Michigan, by formal resolution renounced its further participation in this case, saying that the Shared Time arrangement violates both the Michigan Constitution and the Establishment Clause of the First Amendment to the United States Constitution. Respondents surmise that this may be a belated recognition by that body of the destructive potential of this Shared Time concept, as argued above in this section of Respondents' Brief.

The action taken March 7, 1984 also raises a question of possible mootness of this case. Contrary to the assertion of Petitioners that "the State Board of Education does not have the authority to terminate the continued operation of the programs at issue here", Respondents believe it clearly *does* have that authority under Article VIII, Section 3, of the Michigan Constitution:

> "State board of education; duties. Sec. 3. Leadership and general supervision over all public education, including adult education and instructional programs in state institutions, except as to institutions of higher education granting baccalaureate degrees, is vested in a state board of education. It shall serve as the general planning and coordinating body for all public education, including higher education, and shall advise the legislature as to the financial requirements in connection therewith."

See, also, *Welling v. Livonia Board of Education,* 382 Mich 620, 171 NW2d 545 (1969).

Thus, it seems likely that Shared Time programs conducted at religious schools will be terminated in Michigan regardless of the outcome of this case.

V.

The individual plaintiffs (respondents herein) have standing to attack these educational programs under the establishment clause of the First Amendment.

The Courts below considered this issue at 3a and 67a-70a, finding that the individual Plaintiffs (Respondents here) possess requisite standing under *Flast v. Cohen,* 392 U.S. 83 (1968).

Argument of this issue will be made by Americans United for Separation of Church and State, as AMICUS CURIAE supporting Respondents.

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VI.

CONCLUSION AND RELIEF SOUGHT

The Judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

/s/ ALBERT R. DILLEY
Attorney for Respondents

Business Address:
600 Grand Rapids Mutual Building
201 Monroe Avenue, N. W.
Grand Rapids, Michigan 49503

Telephone:
(616) 459-8381

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